(10)

No. 94-23

In The

Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL, et al.,

Respondents,

and

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

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HIP

QUESTION PRESENTED

Is traditional single-family zoning patterned on the decisions of the United States Supreme Court exempt from coverage under the Fair Housing Act Amendments as a reasonable local restriction on the maximum number of occupants permitted to occupy a dwelling where there is no evidence of an intent to discriminate against the disabled and reasonable provision is made in other zoning districts for group home uses?

PARTIES TO THE PROCEEDING

City of Edmonds, Washington
United States of America
Oxford House-Edmonds
Oxford House, Inc.
Herb Hamilton
Parties Dismissed[1]

[1] The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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CITATIONS OF OPINIONS AND JUDGMENTS

1. Judge William L. Dwyer of the United States District Court, the Western District of Washington, entered an Order on Cross Motions for Summary Judgment in favor of the City of Edmonds and against the named defendants in the original action and the United States of America as plaintiff in the consolidated action on July 15, 1992. *City of Edmonds v. Washington State Building Code Council, et al.*, Nos. C91-215WD, C91-1273WD W.D. Wash (July 15, 1992); *see* Petition for Certiorari, Appendix B.

2. The decision of the District Court was reversed by Circuit Court Judges Eugene A. Wright, William C. Canby, Jr. and Thomas G. Nelson of the United States Court of Appeals for the Ninth Circuit on March 14, 1994. *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802 (9th Cir. 1994), *cert. granted*, 115 S. Ct. 417 (1994); *see* Petition for Writ of Certiorari, Appendix A.

GROUNDS FOR JURISDICTION

Jurisdiction is conveyed to the Court to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254 and Sup. Ct. R. 10.1(a).

STATUTE AND ORDINANCE SECTIONS RELIED ON

42 U.S.C. § 3607(b)(1) creates an exemption from the Fair Housing Act and Fair Housing Act Amendments:

Section 3607. **Exemption.**

. . . .

(b) Numbers of occupants . . .

(1) [n]othing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

At issue is whether the following provisions of the City of Edmonds, Washington Community Development Code (hereinafter "ECDC") constitute such a reasonable occupancy limitation. ECDC Section 16.20.010 USES defines those uses permitted in a single-family residential zone:

16.20.010 USES

A. Permitted Primary Uses.

1. Single-family dwelling units.

B. Permitted Secondary Uses.

1. Foster homes.
2. Home occupation, subject to the requirements of Chapter 20.20.
3. The renting of rooms without separate kitchens to one or more persons.
4. The keeping of three or fewer domestic animals.
5. The keeping of horses, subject to the requirements of Chapter 5.05.
6. The following accessory buildings:

a. Fallout shelters.
b. Private greenhouses covering no more than five percent of the site.
c. Private stables.
d. Private parking for no more than five cars.

ECDC Section 21.30.010 FAMILY defines "family" for the purposes of the "use" provisions of the code:

21.30.010 FAMILY

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

STATEMENT OF THE CASE

The City of Edmonds, Washington (hereinafter "City") has enacted a comprehensive plan and zoning code pursuant to the authority granted it under the laws of the State of Washington. Wash. Rev. Code Ch. 35A.63 (1989 & Supp. 1990). The ECDC sets aside a portion of the City exclusively for single-family residential use and provides other districts for multiple family residences, commercial, light industrial and other uses.

This dispute began during the summer of 1990. Mark Spence, a representative of Oxford House, Inc., the national parent organization of Oxford House-Edmonds,

came to the Puget Sound area on behalf of his organization to establish a self-governing group residence for recovering alcoholics and drug addicts. Mr. Spence reviewed the houses advertised for rent in the July 6, 1990 edition of the *Seattle Times*. Jt. App. at 91, 94. He selected a rental in Edmonds, Washington and leased the residence at 8704 - 216th Street S.W., Edmonds, Washington from defendant Herb Hamilton. Jt. App. at 103, 106. Mr. Spence did not review the zoning classification of the residence prior to leasing it. Jt. App. at 91. The house was the first residence about which he inquired. Jt. App. at 94.

Prior to occupancy of the recovery house, Mr. Spence distributed literature describing Oxford House's operation to its neighbors. Jt. App. at 43, 63. The literature described Oxford House's program including the need (in Oxford House's experience) for approximately 8 to 12 residents in order to provide an adequate economic base to enable the recovery house to be self-sufficient. Jt. App. at 107. After receiving the Oxford House literature, neighbors filed complaints with the City's zoning officials. Jt. App. at 44.

The City's code enforcement officer investigated the complaints by inspecting the house with the permission and in the presence of an Oxford House representative. Jt. App. at 45. Based upon his inspection, the code enforcement officer found that more than five unrelated adult individuals were living in the house. Jt. App. at 45. The enforcement officer referred the matter to the city attorney's office for prosecution as a code violation. Jt. App. at 45. The City filed misdemeanor charges in municipal

court against Mr. Spence, the Oxford House representative and Herb Hamilton, the owner of the house. These individuals in turn filed complaints with the U. S. Department of Housing and Urban Development (hereinafter "HUD") alleging violation of the Fair Housing Act Amendments (hereinafter "FHAA"). Jt. App. at 45, 64. Following contact by a HUD investigator City officials voluntarily withdrew the charges and have taken no further enforcement action pending final resolution by this Court.

The City then initiated a declaratory judgment action against the Oxford House defendants, HUD and the State Building Code Council. The City also initiated review of its Community Development Code in order to assess its accommodation of the local Oxford House facility (hereinafter "Oxford House-Edmonds") and other congregate living arrangements of disabled persons. The City repealed sections which required a conditional use permit for group homes for the disabled in multi-family zones because of its concern that a conditional use permit requirement conflicted with the principles established in the *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). The City's amendments opened one-quarter of the City's rental housing stock or 186 single-family residences for group home use as a matter of right. The City's planning policies encourage the development of treatment facilities, housing for the disabled and group home uses. Jt. App. at 109-110, 113.

At the District Court the United States government requested dismissal of the United States governmental defendants. The District Court granted the motion. Six

months later, the Department of Justice initiated a separate civil action against the City alleging violations of the Fair Housing Act and Fair Housing Act Amendments. The two actions have been consolidated. In order to present a more straightforward issue to the District Court, the parties entered into voluntary dismissals of the City of Everett, Washington, the Washington State Building Code Council and Oxford House-Hoyt (an Oxford House facility in the City of Everett, Washington).

SUMMARY OF ARGUMENT

The City of Edmonds maintains a system of zoning similar to that in place in the majority of communities throughout the country. The basic building block of any zoning scheme is the single-family zone. A single-family zone permits as a matter of right families related by blood or marriage to reside in individual residences as well as groups of five or fewer unrelated adults. The record shows no intent on the part of the City to discriminate. Reasonable provision is made elsewhere in the community for group home uses. The City's zoning system is based on and similar to zoning schemes approved as reasonable on constitutional grounds by the U. S. Supreme Court.

Oxford House and the United States allege that the City's zoning scheme violates the FHAA because the consensual living arrangement of 10 to 12 recovering drug addicts and alcoholics is excluded from the single-family zone. Group homes for the disabled and consensual living arrangements are permitted within all other

zoning districts of the City, many of which include single-family homes in neighborhood settings indistinguishable from that chosen by Oxford House. The zoning system is alleged to be discriminatory solely because the number of unrelated adult disabled persons who may reside in a single-family zoned residence is limited to five while any number of related family members may live within a similar residence provided the residence meets Uniform Housing Code (hereinafter "UHC") square footage standards. The City believes that its single-family zoning scheme is a reasonable local restriction regarding the maximum number of occupants permitted to occupy a dwelling and, therefore, exempt from Fair Housing Act coverage.

The decisions of the U. S. Supreme Court afford a special status to the family. The basic building block of American zoning is the single-family neighborhood. The U. S. Supreme Court's decisions establish that police powers exercised by a city in a zoning code may protect the sanctity of the family, nuclear and extended, as an institution by providing it a preferred and protected place within the community. Such protections are upheld by the U. S. Supreme Court as reasonable under constitutional scrutiny.

The City believes the occupancy exemption applies to the City for three different reasons. First, the long history of single-family zoning before the U. S. Supreme Court has recognized and specifically designated single-family zoning to be a reasonable limitation regarding the maximum number of occupants permitted to occupy a dwelling. Congress is presumed to know that history when using the terms "reasonable local . . . restriction" and "the

maximum number of occupants permitted to occupy a dwelling." Second, application of the plain meaning doctrine supports the City's single-family zone as a reasonable occupancy limit. Third, the legislative history of the FHAA indicates the intention of Congress to provide equal housing opportunities for disabled persons, not the freedom to ignore traditional, reasonable and facially neutral zoning ordinances. The FHAA prohibit a city from establishing special requirements applicable only to the disabled based upon their disability, and do not overrule the basic building block of single-family zoning by implication alone.

ARGUMENT

The City of Edmonds has a classic Euclidian zoning scheme similar to 100 or more cities in the state of Washington and thousands throughout our nation. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). The City's definition of family mirrors the language approved by the U. S. Supreme Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). It extends the benefits and protections of its single-family zone to the extended family following the direction of the U. S. Supreme Court in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977). Finally, it does not apply one set of occupancy limitations to handicapped individuals and another set to families and other groups of unrelated persons in violation of the precepts set forth in *City of Cleburne, Tex. v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985) or the intent of Congress in enacting the FHAA.

A. THE DECISIONS OF THE UNITED STATES SUPREME COURT AFFORD THE FAMILY A SPECIAL STATUS UNDER THE CONSTITUTION

The appellees, the Ninth Circuit Court of Appeals and the dissenting judge in *Elliott v. Athens, Ga.*, 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992), all make the same error. They confuse the classification of uses and designation of uses to specific zones within the city for discrimination. Zoning by its very nature is concerned with classifying different types of uses into appropriate zoning districts. 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.07 (3d ed. 1991). Constitutional zoning which complies with federal discrimination laws is concerned with the characteristics of the use and not the race, gender or disability of the individuals who reside or work within the zoning district. *See* Mark Stanton Thomas, *Exclusionary Zoning and The Reluctant Supreme Court*, 13 Wake Forest L. R. 107 (Spring 1977).

Zoning is an exercise of a city's police powers and the basic building block of zoning structure is the single-family zone. A picture of the zone was described well by Justice Douglas:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs . . . . The police power is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Belle Terre, 416 U.S. at 9.

From its very inception, zoning was created as a tool to set aside and protect a residential area for the exclusive use of families. *Euclid*, 272 U.S. 365 (1926). While sometimes cited as a limitation on city's zoning powers, the *Moore* decision is in reality a reaffirmation of the "private realm of family life." *Moore*, 431 U.S. at 499. The plurality in that decision and, indeed, the dissenting justices, place great importance on the "preferred position in the law" of the family. *Id.* at 511. As the Court noted:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id. at 503-04. *Moore* requires that the benefits of the single-family zone be offered to the extended family and not limited to the nuclear family. *Id.* at 504-05. *Belle Terre* affirms the power of local zoning authorities to limit the extension of those benefits to unrelated adults in order to preserve and protect the resource. Each of these decisions has judged the exercise of zoning authority under the constitutional reasonableness standard of the Fourteenth Amendment Due Process and Equal Protection clauses.

The U. S. Supreme Court's decisions give great deference to the reasonable decision-making authority of local zoning officials to make fine distinctions between uses. *Euclid* dealt at length with a city's ability to differentiate between very similar residential uses, preserving one zone for families by excluding similar but related uses, such as the residences of unrelated adults in apartment and rooming houses. *Euclid*, 272 U.S. at 394-95.

From the City's perspective, the sole issue is whether by enacting the FHAA Congress intended to overturn Euclidian zoning and thereby the definition of family approved as reasonable by the U. S. Supreme Court. The City believes that the exemption for reasonable occupancy limitations must be interpreted in the context of the U. S. Supreme Court's consistent direction in the field of single-family zoning.

B. EDMONDS SINGLE-FAMILY ZONING DEFINITION IS EXEMPT AS A REASONABLE OCCUPANCY LIMIT

The FHAA exempts reasonable local occupancy limitations at 42 U.S.C. § 3607(b)(1). Appellees and the Ninth Circuit believe that the City's ordinance is neither reasonable nor an occupancy requirement. There are three distinct reasons why they are wrong.

When Congress used the terms "reasonable" and "occupancy", it did so in light of the well established history of U. S. Supreme Court cases upholding the reasonableness of single-family zoning ordinances under constitutional principles and classifying the ordinances as "occupancy" limits. As the U. S. Supreme Court has said:

> In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).

1. Single-Family Zoning as an Occupancy Limitation Under Federal Law

After the *Euclid* case, the U. S. Supreme Court did not hear a significant zoning case for almost 50 years. The U. S. Supreme Court's pattern of single-family zoning decisions clearly categorizes the definition of family as an occupancy limit. As any reasonable reading of *Euclid* and *Moore* shows, use regulations are the first and still most prevalent form of occupancy limit.

Well known zoning experts lump all zoning regulations together as use restrictions. 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.119 (3d ed. 1991), discusses the full spectrum of zoning regulations in "use control." More importantly, the Washington statutes which confer zoning authority on the City do not make the distinction urged by Appellees. The City's zoning power originates in Wash. Rev. Code RCW 35A.63.100(2) (1989 & Supp. 1990). This section of state statute allows a city such as Edmonds to enact ordinances that provide for:

> Dividing the municipality, or portions thereof, into appropriate zones within which specific standards, requirements, and conditions may be provided for regulating the use of public and private land, buildings, and structures, and the location, height, bulk, number of stories, and size of buildings and structures, size of yards, courts, opens spaces, density of population, ratio of land area to the area of buildings and structures, setbacks, area required for off-street parking, protection of access to direct sunlight

> for solar energy systems, and such other standards, requirements, regulations, and procedures as are appropriately related thereto. The ordinance encompassing the matters of this subsection is hereinafter called the "zoning ordinance" . . .

Wash. Rev. Code § 35A.63.100(2). Washington decisions and statutes do not differentiate the term "use" regulation from bulk, density or occupancy regulation but rather utilize the term "use" regulation as an umbrella under which various zoning powers and techniques including occupancy limitation are exercised.

In prior argument, appellees asserted that the existence of the UHC represents an acknowledgment by the City that its zoning scheme is not an occupancy restriction. As authority, they cite *Moore*, 431 U.S. at 520 n.16. A closer reading of *Moore* not only fails to support this position, but shows that East Cleveland's ordinance was clearly categorized by the U. S. Supreme Court as an occupancy limit. Justice Stevens' summary of East Cleveland's zoning structure in *Moore* accurately summarizes Edmonds' ordinance because Edmonds' provision has exactly the same structure as the ordinance at issue in East Cleveland:

> Litigation involving single-family zoning ordinances is common. Although there appear to be almost endless differences in the language used in these ordinances, they contain three principal types of restrictions. First, they define the kind of structure that may be erected on vacant land. Second, they require that a single-family home be *occupied* only by a "single housekeeping

> unit." Third, they often require that the housekeeping unit be made up of persons related by blood, adoption or marriage, with certain limited exceptions.
>
> Although the legitimacy of the first two types of restrictions is well settled, attempts to limit *occupancy* to related persons have not been successful.

Moore, 431 U.S. at 515-16. (Emphasis added). The dissent in *Moore* also classified the ordinance as an occupancy limitation. *Id.* at 537. As Justice Stevens noted zoning ordinances assign uses to districts and control the occupancy and use of lots and structures. Housing codes such as those in place in East Cleveland and Edmonds provide additional regulation to plan an upper limit on the structures based upon the square footage of the living areas. The two types of regulation are not mutually exclusive but complementary, addressing different but equally valid local interests.

For example, assume a single-family house in Edmonds has square footage that would allow a total of eight adults under the UHC. Any number of related family members could reside there, up to eight. If a family decided to let rooms, a permitted use, the total number of residents would again be limited to five. Jt. App. at 225. Only one primary residence may be erected on the lot, however, accessory dwelling units are permitted with a conditional use permit. Jt. App. at 225-226. In this case the number of residents permitted is limited by the total square footage of the structures and by their relationship. The interplay of the definition of family and the UHC square footage limits are employed in concert to limit the overall residential use of both the lot and the structure or structures on it.

2. Statutory Language of Exemption Includes Single-Family Zoning as an Occupancy Limit

The second reason the Edmonds' single-family zoning should be classified as a reasonable local occupancy restriction is the plain meaning of the terms employed in the exemption. The plain meaning rule is a fundamental canon of construction: unless otherwise defined, words will be interpreted as taking their ordinary, contemporary and common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The sole function of a court is to enforce a statutory phrase according to its terms. Where the phrase is unambiguous – has a clearly accepted meaning in both legislative and judicial practice – that phrase may not be expanded or contracted by statements of individual legislators or committees during the course of the enactment process. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). When words of a statute are unambiguous, the court should not look at legislative history. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146 (1992). In construing a statute, the task of the Supreme Court is to give effect to the will of Congress and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 113 S. Ct. 1119 (1993).

Where Congress uses terms that have an accumulated, well settled meaning under either equity or common law, the court must infer that Congress meant to use the established, settled meaning. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), *reh'g denied*, 453 U.S. 950 (1981). As noted, the terms employed have a distinct and settled meaning under the U. S. Supreme Court's zoning

decisions. There are also dozens of cases in the common law that define the term "occupant." *See* 29 *Words and Phrases*, "occupant; occupier" (West Publishing Co. 1972). As one would expect, in all real property cases concerning the interpretation of the term "occupant," a person is termed an occupant of that property if he or she has some specified relationship to the land. *See, e.g., Smith v. Sno Eagle Snowmobile Club*, 823 F.2d 1193 (7th Cir. 1987) ("occupant" for purposes of statute granting immunity to "owner, lessee or occupant" held to mean one who has actual use of property without legal title, dominion or tenancy.); *United States v. Fountain*, 2 F.3d 656, 663 (6th Cir.), *cert. denied*, 114 S. Ct. 608 (1993) ("occupant" for purposes of occupants that may be searched incident to search of premises under Supreme Court ruling is any individual whose connection to the searched premises appears to be more than that of an obviously chance visitor.); *King v. Yancy*, 53 F. Supp. 510, 512 (D.C. Nev. 1944) *rev'd on other grounds*, 147 F.2d 379 (9th Cir. 1945) (an "occupant" of a premises within the rule of an occupant's liability for injuries to an invitee is one in possession of the premises by the owner's authority). It is clear that the term "occupant" is not a term that has been exclusively appropriated by building codes. In cases involving real property, the definition of "occupant" relies upon the relationship a person has to property. Consequently, if the Court looks beyond its own decisions regarding zoning the Court should also infer that Congress meant to use the settled meaning of occupant. The use of either approach yields the same result.

The District Court in this case and the majority in *Elliott* relied on the plain meaning of the exemption.

Their reasoning included the long U. S. Supreme Court history in the area of single-family zoning. The dissent in *Elliott* and the Ninth Circuit fall under the trap of collapsing the exemption and reading the term "reasonableness" in the exemption as equivalent to the reasonable accommodation standard of the statute. To do so destroys the exemption.

3. Legislative History Supports Exemption of Single-Family Zoning.

The purpose of the FHAA is to guarantee "equal opportunity" in housing to disabled persons. 42 U.S.C. 3604(f)(3)(B); Jt. App. at 130-131. The FHAA seeks to mainstream individuals and avoid stereotyping. Jt. App. at 134-136. The Appellees and the Ninth Circuit fall into the trap of stereotyping, albeit for the best of reasons. Zoning powers are exercises of the police powers designed to protect the special resource of single-family zoning. Appellees' argument assumes that disabled persons will not have the same failings as others and require local zoning scrutiny. As an individual, a disabled person could be a slumlord, an unscrupulous developer or make inappropriate or illegal use of his or her property. While the Appellees assume this benign stereotype, this view is certainly not mainstreaming.

The Ninth Circuit, in its decision, was concerned that exempting traditional single-family zoning from the FHAA would give broad protection to the majority of cities' ordinances. This protection would prohibit a court from considering a disabled person's claim that they were

excluded from a community, thereby thwarting the legislative goal of mainstreaming. This argument is flawed. The exemption contains the word "reasonable." A court may, therefore, make an initial inquiry into whether a city's zoning ordinance is "reasonable." For example, assume that a community adjacent to the City of Edmonds (also a bedroom community) has a zoning scheme consisting solely of single-family zoning. In that community, the traditional definition of single-family would not be reasonable as it would result in the total exclusion of the group homes for the disabled from the community. Therefore, how the definition of family is applied may still be considered by the courts under the FHAA even if the City's zoning structure is held exempt. In this case all other zoning districts of the City are available for group home use and adequate housing stock is available in them. Jt. App. at 122. The disabled have an equal opportunity to housing as mandated by Congress, but also have the same obligations applicable to other persons under reasonable zoning laws. This demonstrates that the City's zoning structure adequately fosters the goal of mainstreaming and individualization which was the goal of the FHAA.

The Act and Joint Committee comments taken as a whole demonstrate that Congress made a special effort in the Amendments to defer to the extended family in the same manner which the U. S. Supreme Court did in *Moore*. The Amendments and its comments recognize the special status of the family in its distinction between marital status and familial status. The Joint Committee report states that the Acts protection of families does not extend to consensual living arrangements:

> The Committee does not intend this definition [familial status] to include marital status.

Jt. App. at 146. Family is defined much in the same manner as the Court did in *Moore* by referring to a person with a child. Therefore, the assertion that some unrelated adults, i.e., unmarried individuals living in consensual living arrangements, must have the same rights under the Act as a biological or extended family, is untenable in the light of the overall structure of the Fair Housing Act.

Appellees have asserted below that the only acceptable occupancy limitations are those which limit the number of occupants of a structure based on square footage. While it is true that the House Committee commented favorably in its report on such limitations, the specific references to the exemption show that Congress was trying to address a problem not present in the City's zoning structure. In the Joint Committee's Report the potential for local abuse is reviewed:

> These new subsections would also apply to state or local land use in health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have the authority to protect the safety and health, to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps who live in cities. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). This has been accomplished by such means as the enactment or imposition of health, safety or land use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements have

> not been proposed on *families and groups of similar size of other unrelated people*, these requirements have the affect of discriminating against persons with disabilities.

Jt. App. at 147-148 (emphasis added). The use of the phrase "[f]amiliēs *and* groups of similar size of unrelated persons . . . " makes it clear that Congress was trying to adopt a standard which addressed the problem referenced in the *City of Cleburne* case. The use of the conjunctive "and" rather than "or" serves to emphasize that aim.

In *City of Cleburne*, the U. S. Supreme Court invalidated an ordinance which required homes for the mentally disabled to obtain a special use permit in order to locate in a multi-family zone while permitting a wide variety of other multi-family or high occupancy uses:

> The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherstone home and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities freely permitted?

City of Cleburne, 473 U.S. at 447-48. The Court in *City of Cleburne* an equal protection case, reviewed whether

"similarly situated" persons were subject to the same restrictions and rights under the law. *Id.* In *City of Cleburne*, a disabled group home was required to obtain a conditional use permit while other rooming houses or fraternity houses were not.

The City's zoning structure, however, permits larger groups of unrelated adults to locate as a matter of right in the same zones as similarly situated groups and uses. No special requirements or use permits are necessary. Further, smaller groups of disabled persons desiring to live together, as well as families with disabled members, are welcome in the single-family zone. This allows mainstreaming in a way that does not abrogate traditional single-family zoning.

42 U.S.C. § 3607(b)(1) allows a City to enact reasonable zoning ordinances containing limits on occupancy. The language referring to a "minimum number of square feet in the unit or the sleeping areas of the unit" is illustrative of one method used by some municipalities to regulate density. It does not purport to be an exclusive method of regulation, nor is an ordinance per se unreasonable if it is not based on square footage or number of bedrooms.

This point is emphasized in the Joint Committee Report:

> *A number of jurisdictions* limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit.

Jt. App. at 163 (emphasis added). The language used is instructive. "A number" is a long way from "most", a

"majority" or even a "substantial number"; yet Appellees would have this Court infer that Congress intended to invalidate the majority of single-family zoning occupancy limits on the basis of a reference to how "a number" of jurisdictions address this problem. Square footage limitations are clearly valid; it seems equally clear that other "reasonable" approaches may exist, including the historic choice of the majority of local jurisdictions.

C. Ninth Circuit Reasoning Bootstraps Protections of Disabled Individuals to Otherwise Unprotected Groups

In a decision involving application of the FHAA, the Third Circuit analyzed *Moore* and *Village of Belle Terre*, concluding:

> It follows that the City of Butler, no matter how valid its density concerns, could not constitutionally limit the number of related persons living together. If the absence of an occupancy limitation on the members of a family who can live together is bootstrapped into the argument that therefore there can be no occupancy limitation for unrelated persons living together, there could never be such an occupancy limitation and *Belle Terre* would be meaningless. We cannot accept such a result.

Doe v. City of Butler, 892 F.2d 315, 321 (3rd Cir. 1989).

The rationale rejected by the Third Circuit is precisely the rationale advanced here by the United States and Oxford House. They attempt to bootstrap the rights of individual disabled persons to extend protection under the Fair Housing Act to voluntary residential associations

of handicapped persons. This was not Congress' intent and indeed runs counter to the very structure of the Fair Housing Act. For the purposes of defining discrimination on the basis of familial status, Congress has itself adopted a structure which defines family in terms of minors living with their parent or other custodial guardian. *See* 42 U.S.C. § 3602(k).

As the Third Circuit noted in *Doe v. City of Butler*, this bootstrapping argument is an attempt to extend rights enjoyed by individuals to those of associated persons. These associational relationships are not rights protected by the First Amendment in its protection of freedom of association. *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911-12 (N.D. Cal. 1970).

The U. S. District Court in Minnesota has noted that the focus of FHAA protection is the disabled individual and not institutions and organizations. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1400 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). In dismissing a preemption claim that Familystyle advanced to invalidate a 1320 foot separation requirement between community living arrangements, the court stated:

> Nonetheless, the Act does not prohibit any and all state laws which have some impact on the handicapped. Even the House Report uses language which states that laws are prohibited which impact an *individual's* choice of residence.

Familystyle, 728 F. Supp. at 1401.

As in this case, St. Paul's limits did not prohibit individual disabled persons from occupying a particular

house, only institutions, or in this case, an unincorporated association.

The record clearly indicates the institutional nature of the Oxford House program. Individuals come, go and are expelled pursuant to the "Oxford House experience." Jt. App. at 168-172. This program is clearly an institutional approach to recovery and as such is subject to reasonable government regulation of the type discussed in *Familystyle*. The "family" protected in *Euclid*, *Belle Terre* and *Moore*, whether biological, nuclear or extended, implies a degree of stability and cultural identity simply not present in a consensual living arrangement of a constantly changing cast of adults.

Appellees argue the right of individual disabled persons to choose the location of their home. The facts are clear, however, that the individual residents did not choose the location of the House, a representative of the Oxford House parent organization did. Jt. App. at 93, 102-103. Any assertion that individual residents choose their place of residence, as opposed to enrolling in a recovery program, is unsupported by the facts. Oxford House Edmonds is an association of persons institutionalized under a national organization and strictly governed by its charter and the terms of a government grant.

D. Other Indications of Ordinance's Reasonableness

1. Economic Protection of Single-Family Zone

It is instructive to note a District Court's response in the case to an economic argument of the type put forward

by Oxford House – that it needs 8-12 residents in order to be self-sufficient. *Palo Alto Tenants Union*, 321 F. Supp. at 911. The court noted that allowing large unrelated groups into single-family neighborhoods could destroy rent structures making it impossible for a traditional family to afford rent:

> Many older neighborhoods have large, once distinguished town houses which are not owner occupied. Often owners find it more profitable to rent these dwellings, not to single families, but to large groups of unrelated persons with independent sources of income. Such groups are able to pay, collectively, far more in rent than can traditional families with one, or at best two, wage earners. Thus the rent structure of a whole neighborhood may be affected by opening R-1 zones to large, unrelated living groups. As the rent and property value structure of the neighborhood is changed, single families move out, and the character of the area is altered.

Id. at 912-13.

While there is currently only one Oxford House in Edmonds, the arguments advanced are equally applicable to other groups who have been historically economically disadvantaged. The ability of any group of unrelated individuals who are within a category protected by the Fair Housing Act to ignore zoning occupancy and density limits would destroy the effectiveness and purpose of single-family zoning.

2. Balancing of Relative Harm Favors Reasonableness of Ordinance

The standard of reasonableness applicable to this case and utilized in federal law should be based upon a balancing of rights and obligations. *Elliott v. City of Athens, Ga.*, 960 F.2d 975, 981-83 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992). Appellees' standards of reasonableness fails to address why a traditional Euclidian occupancy limit is unreasonable. Their arguments also ignore a balancing of interests and the lack of real harm or detriment which Oxford House would suffer by being required to comply with the same occupancy and zoning standards that every other renter and citizen must meet. The City is simply asking Oxford House to locate in a mixed use, higher density residential zone identical to the location Oxford House chose and defended in Cherry Hill, New Jersey. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

As Oxford House's responses to interrogatories and requests for admission show, the Oxford House representative was unfamiliar with Washington state in general, and South Snohomish County in particular when he came to look for a house. Following his arrival from Washington D.C., he reviewed the rental section of one local newspaper only and selected a house in South Snohomish County. When that house proved satisfactory for his needs, it was rented without regard to its zoning. It was the first house he viewed. Oxford House's manual informs interested disabled persons wishing to establish such a recovery house that they are not obligated to

comply with local zoning occupancy limits. Jt. App. at 167.

There is no evidence that Edmonds multi-family zones are in any way unsuited to Oxford House's program. Appellees attempted to address this deficiency below by manipulating census data to show that due to low rental vacancy rates there may be few single-family type homes for rent. This is a factor of the economy, not of municipal zoning, and effects all prospective renters equally, not just persons with disabilities. Under the Fair Housing Act, persons with disabilities are guaranteed the same opportunity as those without disabilities. Unfortunately, as anyone who has tried to rent a home in the Puget Sound area knows, nothing guarantees the availability of a dream home at an affordable price.

In fact, the census data cited shows the reasonableness of the City's zoning structure. Oxford House misstated the record by confusing single-family homes with rental units. The 12,945 housing units listed in the census include rooms, apartments, and condominiums, all unsuitable for Oxford House's program. Jt. App. at 122. According to Ms. Dusenberry's affidavit, out of 8,550 single-family housing units, 967 are renter occupied and 148 are vacant. Jt. App. at 122. Therefore out of a total of about 1100 single-family houses available for rent, 258, or about one-quarter of the total, are within the multifamily zone. The City can guarantee "meaningful access" by ensuring that a significant portion of its total single-family type rental housing is in a zone available

for Oxford House's use; it can control neither the economy nor vacancy rates. *Elliott v. City of Athens*, 960 F.2d at 982.

Oxford House's approach also violates a basic principle of reasonable accommodation, that disabled persons seeking to be accommodated have a correlative duty to act reasonably in the process. As explained in *Barron v. Safeway Stores, Inc.*, 704 F. Supp. 1555 (E.D. Wa. 1988):

> Both Washington and The Ninth Circuit recognize that the accommodation duty does not place the entire burden on the employer. Rather, the employee bears a "correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer."

Id. at 1568. Congress specifically directed that the enactment of the Amendments to be applied and interpreted in conjunction with other enactments designed to protect the rights of the disabled. Jt. App. at 143.

A court's determination of "reasonableness" should also include the City's amendment of its zoning code to permit congregate living arrangements of more than five (5) unrelated persons to be located as a matter of right in the City's multi-family and other zones. In its operations manual Oxford House claims that it has the *sole* right to determine where its houses can be located. This is the position of the national organization:

> As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood. It considers itself no different from a biological family and its members just move into a suitable house.

United States v. Village of Palatine, Ill., 37 F.3d 1230 (7th Cir. 1994). The City asserts that so long as its zoning scheme is neutrally applied to limit the occupancy of structures by number of residents and adequately provides for group home uses in other zoning classifications, it is not in violation of the Fair Housing Act.

The City restricts the number of unrelated persons, disabled or otherwise, who can occupy a structure in a single-family zone to five or fewer. Disabled persons within a family unit or members of a family unit who are not disabled can live together without limit, as required by the U. S. Supreme Court in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The City's five or fewer unrelated person limit provides more flexibility than the constitutionally valid limit of two or fewer persons upheld in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). This flexibility should also be included in a court's determination of the "reasonableness" of the City's ordinance. The 1990 census indicated 2.41 persons per household in the City of Edmonds, down from the 1980 count of 2.64 persons per household, and points out the statistical basis and validity of the Edmonds' single-family zone as an occupancy limit. Jt. App. at 110.

The City's interest in preserving the single-family zoning resource is recognized and protected by the U. S. Supreme Court in *Euclid*, *Belle Terre*, and *Moore*. While it is true that a single exception will not damage the City's zoning scheme, abrogation of single-family zoning as it applies to the disabled opens the door to an enormous change in the traditional structure of zoning. Congressman Sensenbrenner estimated that there are 36,000,000 disabled persons at the date of the report. H. 4604 Cong.

Rec. 6.22.88. Therefore, while one group home may have only a slight impact on a neighborhood, the cumulative effect of prohibiting application of the single-family definition to disabled persons, or any protected group under the FHAA promises to destroy the basic building block of zoning.

The impact of relocating Oxford House to one of the properly zoned multi-family homes is minimal. As has been noted, the locations made available in Edmonds of mixed use residential properties in multi-family neighborhoods are virtually identical to the area defended by Oxford House in the *Cherry Hill*, New Jersey case. The only detriment which Oxford House would suffer is the requirement that, after four years of operation, they relocate to a properly zoned location. As the concurring opinion in the Seventh Circuit's decision in *Palatine* noted:

> [h]ad the Oxford House not *disregarded the law in the first place*, there would be no residents illegally living in the house who could be stigmatized. In seeking affirmance of the preliminary injunction, Oxford House also emphasizes the harm its residents would suffer if displaced. Any such harm is the Oxford House's own doing; again, had Oxford House not prematurely moved the occupants into the house, no displacement would have occurred.

Palatine, 37 F.3d at 1235 (Marion, J. concurring), (emphasis added).

Therefore, in applying a balancing test such as the Eleventh Circuit did in the *Elliott* decision, the City

requests that the U. S. Supreme Court consider the traditional deference given to zoning enactments designed to protect a place of quiet seclusion for the family and balance it against the negligible impact on Oxford House residents of relocating to a properly zoned area of the City.

CONCLUSION

Appellant City of Edmonds respectfully requests that the Court reverse the Court of Appeals' decision. The Appellees, in their zeal to support the worthy cause of rehabilitation, ignore the long history of single-family zoning facts of this case and the lack of any negative impact on Oxford House by compliance with City zoning. The City concurs and its planning policies recognize that there is a real and growing need for innovative forms of treatment. Living arrangements which permit individuals to gain control of their lives and which mainstream disabled individuals should be encouraged. The crux of the dispute here is not "whether" but "where." The City asks only that, based on traditional concepts of single-family zoning as an occupancy limit, group homes locate in areas of the City which were planned, designed and intended for higher density or occupant load uses.

There is no evidence in the record that these multi-family zoned areas of Edmonds are unsuitable for Oxford House's program and indeed the description of the surrounding neighborhood from *Oxford House v. Township of Cherry Hill, N.J.*, clearly points out that Edmonds' multi-

family zones are better suited in many ways than locations which Oxford House has selected and defended in other jurisdictions. The location of the current Oxford House facility is one of happenstance. The house could easily be located in an appropriately zoned area of the City without detriment to the recovery process.

The application of a standard of reasonableness implies a balancing of interests. It seems obvious from the record that while there are little in the way of negative impacts to the Appellees, there are huge potential impacts for the City's zoning structure and indeed zoning structures throughout our country. Zoning ordinances which are designed to exclude disabled individuals entirely from the community should be struck down. Zoning ordinances which welcome the disabled in exactly the same manner as persons without disabilities by affording equal opportunities to individuals and families with disabled members and by providing adequately zoned land are not exclusionary.

This dispute also involves the issue of mainstreaming, and whether disabled individuals should have the same opportunities and obligations as other citizens. The City fails to see where or how the Fair Housing Act can be interpreted to sweepingly invalidate the historic occupancy limitations continually reviewed and approved by the U. S. Supreme Court and in place in a majority of jurisdictions throughout the country. To do so would invalidate most zoning communities' schemes.

This is not and never has been a case of discrimination. Rather, it is a case regarding whether a local jurisdiction may maintain its traditional zoning powers and exercise them to reasonably classify uses which includes

disabled persons within the community under exactly the same rights and limitations applicable to other citizens.

Respectfully submitted.

W. Scott Snyder

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